General Dynamics Corporation, Quincy Shipbuilding Division *and* Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO. Case 1-CA-20013

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 February 1983 Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish certain information requested by the Union, namely, a study prepared for the Respondent by a professor from the Massachusetts Institute of Technology, herein called the MIT study. In reaching that conclusion, the judge found, inter alia, that the information requested was relevant and necessary to the Union's representative function and that the Union did not "clearly and unmistakably" waive its right to receive such information. Further finding that the Respondent had presented no evidence of an "aura of confidentiality of a legitimate and substantial nature," the judge rejected the Respondent's defense that the information was privileged from disclosure. The judge therefore included in his recommended Order an unconditional order that the Respondent provide the Union access to the MIT study. While we agree generally with the judge's findings and conclusions,[2] we do not agree with his total rejection of the Respondent's confidentiality defense.

The essential facts are as follows. In December 1979, the Respondent contracted with Coastwise Trading Company to build three petroleum barges, Hulls 73, 74, and 75. The Respondent contracted to build a fourth barge, Hull 82, in November 1980. On 30 July 1981 Coastwise filed the first of several lawsuits against the Respondent in New York state court seeking damages and other relief for alleged delays in the delivery of the four barges. Thereafter, in October 1981, the Respondent discovered serious defects in the piping system on Hull 74, which had been installed by unit employees. The Respondent thereafter agreed, upon Coastwise's insistence, to subcontract the reinstallation work to a firm in England. Around the same time, the Respondent also commissioned a professor from the Massachusetts Institute of Technology to study the piping system before it was replaced. This study was conducted and issued in a written report between October 1981 and March 1982.

Meanwhile, Coastwise continued to press its lawsuits against the Respondent. Thus, in its complaint filed in October 1982, Coastwise alleged, inter alia, that "General Dynamics was aware from early October 1981 that its work in installing the heating coils of [Hull 74] was defective and would require replacement," and that the "primary reason for the delay in delivery of [Hull 74] . . . has been the defective work of General Dynamics with respect to the Vessel's heating coils." The Respondent pointed out in its brief to the Board that the litigation instituted by Coastwise was still pending.

The Respondent first advised the Union of the existence of both the MIT study and the litigation

[1] The judge stated in fn. 2 of his decision that he did not credit the testimony of the Respondent's manager of labor relations, Raffeld, that he told union officials Brandow and Piccuito that the MIT study was a "confidential employer record." The record indicates, however, that although Raffeld testified that he told Brandow and Piccuito that other requested information, e.g., blood-lead test results, constituted confidential employer records, he did not testify at all regarding his response to the Union's requests for the MIT study. We therefore shall reverse this erroneous credibility finding of the judge.

In sec. III,B, par. 4 of the judge's decision, the second sentence is hereby clarified as follows: "According to Brandow, Raffeld stated that although he originally had told them that the problem with the piping was poor workmanship he never had refused to give them other reasons." We also shall correct the judge's references to the Union's grievance committee chairman, Sinclair, as "St. Clair."

[2] We agree with the judge's conclusion that the instant dispute over the Union's request for the MIT study is not an appropriate matter for deferral to arbitration. In so finding, we rely particularly on the fact that the Union requested the study for the purpose of determining whether to proceed with grievances it was planning to, and later did, file regarding the subcontracting of unit work. Thus, the procedural issue of disclosure of the study is merely preliminary to the resolution of the parties' substantive dispute over the subcontracting. In these circumstances, we find no merit in encumbering the process of resolving the pending subcontracting grievances with the inevitable delays attendant to the filing, processing, and submission to arbitration of a new grievance regarding the information request. Such a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration. Nor would it be consistent with prior Board decisions in this area. See, e.g., *Safeway Stores*, 236 NLRB 1126 fn. 1 (1978); *St. Joseph's Hospital*, 233 NLRB 1116 fn. 1 (1977).

Additionally, in agreeing with the judge's conclusion that the step 2 language of the parties' collective-bargaining agreement did not waive the Union's right to request and have access to the MIT study, we do not rely on his findings that the phrase "classified or confidential Employer records" in art. 4, sec. 4, refers only to "inplant" records and further that the MIT study was not an employer record because it was prepared by an independent contractor. Even assuming that the above-quoted phrase encompasses documents like the MIT study, we find that the contract language does not constitute a "clear and unmistakable" waiver by the Union.

pending against the Respondent at a meeting on 10 June 1982, in response to union inquiries about rumors that the piping on Hull 74 had to be replaced. At that meeting, the Union, indicating that it had possible grievances in mind, made the first of several requests to examine the MIT study.[3] On 27 July, about a month after the Respondent finally advised the Union that it would not make the MIT study available, the Respondent again mentioned the Coastwise litigation before giving the Union a brief oral summary of the MIT study.

Based on the foregoing, the judge found that the Respondent's claim of confidentiality was without merit. The Respondent excepts to that conclusion, and asserts that the MIT study is a confidential document, prepared for the Respondent in contemplation of litigation, and that its disclosure would harm the Respondent in its defense of the pending lawsuits. We find merit in the Respondent's exception. Contrary to the judge, we find that the existence of the lawsuits, which involve substantial liability, coupled with the timing of the study with respect to those lawsuits, establishes that the study was prepared in contemplation of litigation.[4] Further, the Respondent has established that disclosure of the study would have an impact on the pending litigation. Thus, we find that the Respondent has established a confidentiality concern of a legitimate and substantial nature.[5]

We also recognize, however, the relevance of the MIT study to the pending grievances filed by the Union as well as the importance of the parties' having a free flow of information to encourage the amicable resolution of collective-bargaining disputes. The Board is therefore required to balance the union's need for the information against the legitimate confidentiality interest established by the employer.[6] Here, in acknowledging the Respondent's legitimate interest in seeking to preserve the study's confidentiality, we find that the Respondent's interest does not outweigh the Union's statutory right to relevant information such that the Respondent may withhold the study entirely. To the contrary, we agree with the judge that the Respondent's complete refusal to furnish access to the MIT study is violative of Section 8(a)(5) and (1). We find, however, that some accommodation must be made to the Respondent's legitimate concerns not to have information of a confidential nature revealed.[7] Accordingly, and consistent with the policy we have followed in recent cases presenting similar issues,[8] we shall order the parties to bargain in good faith in order to reach a mutually acceptable accommodation of their respective interests. We therefore shall revise the judge's recommended Order to provide that the Respondent shall furnish the Union access to the MIT study subject to bargaining in good faith regarding the conditions under which the information may be furnished, such that access is provided in a manner consistent with maintaining appropriate safeguards protective of the Respondent's confidentiality concerns.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Dynamics Corporation, Quincy Shipbuilding Division, Quincy, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) On request, provide Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, access to the MIT study subject to bargaining in good faith concerning the conditions under which the information may be furnished to the Union, such that access is provided in a manner consistent with maintaining appropriate safeguards protective of the Respondent's legitimate confidentiality interests."

2. Substitute the attached notice for that of the administrative law judge.

[3] On 21 June the Union filed two grievances alleging that unit work had been subcontracted in violation of the parties' collective-bargaining agreement. The Respondent denied both grievances at step 1 on 22 June.

[4] In this regard, we note that the complaint filed against the Respondent by Coastwise in October 1982 alleges that the Respondent was aware from early October 1981 that the piping installation on Hull 74 was defective and would require replacement. Moreover, the Respondent had already been sued by Coastwise when it commissioned the study. Thus, it could reasonably apprehend the possibility of another lawsuit relating to the defects.

[5] See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980). See also *Plough, Inc.*, 262 NLRB 1095, 1096 (1982); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982).

[6] See *Detroit Edison Co.*, above at 314–320; *Johns-Manville Sales*, above at 368.

[7] *Ingalls Shipbuilding Corp.*, 143 NLRB 712, 718 (1963).

[8] *Kelly-Springfield Tire Co.*, 266 NLRB 587 (1983); *Plough, Inc.*, above; *Minnesota Mining & Mfg. Co.*, above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to provide access to the MIT study requested by the Union for its evaluation in effectively performing its representative function in processing employee grievances.

WE WILL NOT fail or refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, provide the Union access to the MIT study requested for its evaluation, subject to bargaining in good faith concerning the conditions under which such information may be furnished to the Union, such that access is provided in a manner consistent with maintaining appropriate safeguards protective of our legitimate confidentiality interests.

WE WILL, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit as described in article I, section 1 of the current collective-bargaining agreement.

GENERAL DYNAMICS CORPORATION, QUINCY SHIPBUILDING DIVISION

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon a charge and an amended charge of unfair labor practices filed on June 30, 1982, and August 4, 1982, respectively, by Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called the Union, against General Dynamics Corporation, Quincy Shipbuilding Division, herein called Respondent, a complaint was issued by the Regional Director for Region 1, on behalf of the General Counsel, on August 13, 1982. In substance the complaint alleges that the Union, as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit, requested Respondent to furnish it certain information which was relevant to its performance of its function as the exclusive collective-bargaining representative of employees; that Respondent has failed and refused to furnish the information requested; and that its failure constituted a violation of Section 8(a)(5) and (1) of the Act.

In its answer filed on August 24, 1982, Respondent denied that it has engaged in any unfair labor practices as alleged in the complaint.

The hearing in the above matter was held before me in Boston, Massachusetts, on October 27, 1982. Briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, which have been carefully considered.

On the entire record in this case and from my observation of the witness, I make the following

FINDINGS OF FACT

I. JURISDICTION

General Dynamics Corporation, Quincy Shipbuilding Division, Respondent herein, is, and has been at all times material herein, a corporation organized under and existing by virtue of the laws of the State of Delaware. As such, Respondent has at all times material herein maintained an office and place of business at 97 East Howard Street, in the city of Quincy, Massachusetts, where it is and has been engaged in the manufacture, sale, and distribution of ships.

In the course and conduct of its business operations, Respondent receives goods valued in excess of $50,000 annually from points located outside the Commonwealth of Massachusetts.

The complaint herein alleges, Respondent admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

At its Quincy, Massachusetts location Respondent is engaged in the construction and maintenance of commercial vessels, including ships and barges. During the years 1981 and 1982, Respondent contracted with Coastwise Trading Company to construct what is called a deep-notch petroleum barge. Respondent constructed such a vessel which it identified as Hull 74 and which Coastwise Trading Company later named the "Amoco Virginia." A portion of the construction of Hull 74 required the installation of a piping system which involved sketching of the configuration of piping, cutting, bending, annealing and welding piping. This work, in the past and during the construction of Hull 74, was performed by employees in the Quincy shipyard. After a considerable amount of the piping had been installed in October 1981, Respondent discovered that there were serious defects in the installation. Consequently, on the insistence of the owner, they agreed to remove the defective piping system and reinstall a corrected piping system. In doing so, Respondent subcontracted the manufacturing of the piping to Yorkshire Imperial Metals, of Yorkshire, England, with the understanding that the piping would be bent and annealed by Yorkshire Imperial, and thereafter installed in the vessel.

However, before the defective piping was removed, Respondent retained a consultant from the Massachusetts Institute of Technology to study the piping system. The consultant, Professor Edgar, did conduct such a study

and issued a report thereon between October 1981 and March 1982, herein called the MIT study. Thereafter, the initial piping system was removed and a second piping system was delivered from Yorkshire to the Quincy shipyard in a bent and annealed state, and subsequently installed in Hull 74. Consequently, none of the sketching, bending, or annealing of pipework was performed by unit employees in the Quincy shipyard.

Members of the Union (Union President John Brandow and Vice President Richard Piccuito) learned about the MIT study and Respondent's arrangement to subcontract work to replace the piping system on Hull 74. Since all such piping work prior thereto had been performed by Respondent's yard unit workers, the Union requested the report of the MIT study. Respondent refused to furnish the Union with the report of the study and its refusal is the subject of this current dispute.

Article IV, section 4, step 2 on page 12 of the collective-bargaining agreement between the parties, effective October 17, 1980, through October 16, 1983 (Jt. Exh. 1), provides as follows:

> A grievance appealed to Step 2 of the grievance procedure shall be submitted by the Steward to the Department Head or his designated alternate of the Department. If there is disagreement as to the facts relating to the grievance, the Department Head and the Steward shall, at the request of either, jointly investigate the facts; provided, however, that this shall not require the department head to make available to the Steward classified or confidential Employer records. If the Steward and Department Head are unable to reach a satisfactory adjustment within three (3) working days after the grievance is presented to the Department Head, the Union may appeal the grievance to step 3 of the grievance procedure.

On June 20, 1982, the Union, on behalf of Respondent's unit machine operators in Department 843, filed a grievance (Jt. Exh. 3) demanding that its machine operators be made whole for being deprived of the work subcontracted to the Yorkshire company and the installation of the second piping system. On the same date the Union, on behalf of Respondent's unit sketchers in Department 843, filed a grievance (Jt. Exh. 4) demanding that all unit sketchers be made whole for hours and overtime work of which they were deprived as a result of Respondent having subcontracted installation of the second piping system, and for Respondent's failure to comply with the current collective-bargaining agreement.[1]

B. *Respondent Refuses the Union's Request for the MIT Study*

The essentially undisputed testimony of record establishes that former steward and current union president, John Brandow, and Union Vice President Richard Piccuito met frequently on numerous occasions over the past 3 years with members of management, usually Respondent's labor relations managers Dale Raffeld and/or Fred Stobart. On or before June 4, 1982, Brandow and Piccuito asked Managers Raffeld and Stobart about the validity of a rumor that the Company was sending sketches on piping work to England to be used as fabrication of pipe to be installed on Hull 74. Raffeld and Stobart said they were unaware of such an arrangement but Raffeld said he would find out and get back to them. When they met with Raffeld on June 7, 1982, they asked Raffeld if he had investigated the rumor on subcontracting, and Raffeld said he had not had a chance to do so.

When union officers Brandow and Piccuito met with Raffeld on June 10, Raffeld informed them that Respondent had commissioned a study by a consultant from Massachusetts Institute of Technology (MIT study); that the findings thereof revealed that the piping system malfunctioned because of poor quality and serious defects in workmanship on the piping and pipe bending. He also advised them that sketches of how the pipe should be bent were sent to England. Thereupon, Brandow asked Raffeld if the Union could examine a copy of the MIT study, since it appeared relevant to a potential grievance the Union was contemplating processing. Raffeld said he did not know if he would make the study available to them. Brandow said he thought the Union had a right to the study under the National Labor Relations Act. Raffeld said, "Don't play games and don't threaten me," but he said he would evaluate their request. Brandow advised Raffeld that the Union needed the study in order to determine whether it had valid reasons to process a grievance, and also, to determine if there were some things in the study which indicated a weakness in the contract language, which an examination of the study would enable the Union to improve on such language by seeking to amend the contract during negotiations.

On June 15, in response to their request for the study, Raffeld told Brandow and Piccuito the study was still not available; that he was still reviewing it. Raffeld told them the same thing on June 17 and 21. On June 24, Raffeld told them he would have to check with management before he could make the study available to the Union. Finally, on June 28, Raffeld told them he had completed his review of the study but it was not going to be made available to the Union; and that work quality and poor workmanship were only one aspect of the problem. When they asked Raffeld to tell them about other aspects of the problem he declined to do so by saying, "I don't have to tell you." However, Raffeld denied that he made the latter quoted statement, but instead, said he told Brandow and Piccuito the study was a confidential record of the Company. Brandow and Piccuito denied that Raffeld told them the study was confidential or classified, or that the Company (Raffeld) had ever refused to supply the Union with information requested by the Union. However, on further cross- and redirect examination, Piccuito modified his denial and admitted the Company had previously refused to submit it requested infor-

[1] The facts set forth above are undisputed and are not in conflict in the record.

mation of employees' medical blood-lead and safety tests before the grievance was processed to step 2.[2]

On July 26, when Brandow, Piccuito, or George O'Kane met with Raffeld, Brandow asked Raffeld for the MIT study and Raffeld informed them that it was not available and would not be made available. Raffeld said he wanted to go on record by having Raffeld refuse to furnish the study without giving them reasons for such refusal. However, Brandow stated that in processing 300 to 400 grievances in his official union capacity over the years, Respondent had never told him he was not entitled to information requested by the Union, except on one occasion in reference to the Company's affirmative action plan.

On July 27, Raffeld voluntarily stated that he wanted to acquaint Brandow and Piccuito with a summary of the MIT report. He commenced by advising them that the Company was being sued for approximately $15 million; that the Company had discussions with Coastwise and the discussions indicated that the piping, the reinstallation, and the subcontracting of the piping work had to be sent to Yorkshire, England.

With respect to the piping work, Brandow testified that Raffeld's briefing to them continued as follows:

> It was to be bent by a firm called Carlton-Leslie, which he indicated had a great amount of experience in bending aluminum brass piping, particularly because of what he characterized as a complicated procedure, an annealing procedure that had to be done on the pipe.
>
> He explained that the report did not focus on poor workmanship, but rather on the procedure and the handling of the pipe; that, as I said, there was this annealing procedure that should have been gone through, and would have to be gone through in the future; that had not been followed at the yard, for one reason or another, and had resulted in a leakage in porosity of the pipe; and that the contracting would—the subcontracting would go out to Carlton-Leslie for the pipe bending.
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> We—I asked whether any of the bending was going to be done inside the shipyard, after the subcontract was let out. And Mr. Raffeld indicated that there were going to be about 100 bends that would be done inside the shipyard, for a final fit of the piping, that sort of thing; but as few as possible due to the agreement that they had with Coastwise.
>
> I believe that was the long and the short of what he had to say about the report; the emphasis being that it was more the handling and the procedures, rather than poor quality workmanship, and the specific machinery that Carlton-Leslie had that he felt the yard wasn't equipped with.

Brandow further undeniably testified that Raffeld never stated to them that the MIT study was not going to be submitted to the Union under step 2 of the grievance procedure, or that the Union had waived its right to such information. Also, the Union's officer *Arthur Durant*, a pipefitter in Department 843 of Respondent's plant, testified that, in the course of processing about 1000 grievances, the Company had never refused to furnish the Union information on the grounds that it was confidential or classified, or that the Union had waived its right to such information under step 2 of the grievance procedure. Durant further testified that when he told Company Superintendent Joe Metiever that the employees had always performed the annealing work and he did not understand why it was being subcontracted, Metiever simply responded, that it came from the top.[3] Dale Raffeld testified that over the years he had told the Union it could not furnish it with health or safety records because they are confidential employer records under the contract. However, Jonathan Brandow denied that the Company had ever refused the Union requested information of records on blood-lead tests or on the basis that they were private or confidential, but simply informed the Union that it was not entitled to such records.[4]

IV. ANALYSIS AND CONCLUSIONS

As to whether union access to the MIT study is relevant and necessary for the Union to perform its function as collective-bargaining representative of Respondent's unit employees, counsel for the General Counsel argues that the study is relevant and necessary in accordance with the Supreme Court's decision in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967). There, the Court held that an employer has a duty under the Act to supply, on request, such information which is probably relevant, in fact relevant, necessary, and useful to a union's effective and intelligent evaluation in determining whether to process employee grievances.

Counsel for Respondent does not specifically argue that the MIT study is not relevant and necessary, but rather that the study is privileged against disclosure because it is a confidential employer record; and because

[2] I credit Brandow's testimony to the effect that Raffeld told Brandow and Piccuito he (Raffeld) did not have to tell them why he was not going to make the MIT study available to the Union. Not only was Brandow's testimony corroborated in this regard by Piccuito, but it is consistent with the evidence of the initial reluctance by Respondent to tell the Union whether or not it was going to make the study available to the Union. Similarly, I do not credit Raffeld's testimony that he told Brandow and Piccuito the study was a confidential employer record, because Brandow and Piccuito denied he gave them such a reason, and their denials are consistent with evidence of Respondent's reluctance to state whether it would allow the Union access to the study, as well as with its past practice of advising the Union in writing that the information (blood-lead and safety tests results) requested was confidential. Additionally, I was also persuaded by the demeanor of the witnesses that Brandow and Piccuito were testifying truthfully in this regard, and Raffeld's denial was not truthful.

[3] I credit Durant's testimony not only because I was persuaded by his demeanor that he was testifying truthfully, but also because his account is essentially consistent with the testimony of Brandow, except with respect to the request for the blood-lead and safety test results. However, it may be reasonably assumed that Durant was not involved in any of the requests for blood-lead or safety tests results.

[4] I credit Raffeld's testimonial account over Brandow's account, which is essentially consistent with Piccutio's account, that Raffeld (Respondent) had previously refused to give the Union blood-lead and safety tests results on the ground that the results were confidential. I was also persuaded by the demeanor of Raffeld and Brandow that Raffeld's account was accurate and Brandow's account was not accurate, in this regard.

the Union has waived any entitlement to the study under the language of article IV, section 4, step 2 of the grievance procedure of the contract between the parties. With respect to the relevance of the study to the Union's representative function, the essentially undisputed and credited evidence shows that, on request by the Union, Respondent's labor relations manager (Raffeld) investigated a rumor that the initial piping system on Hull 74 was going to be subcontracted to a company in Yorkshire, England. Raffeld subsequently advised the Union that a consultative study (MIT), made on behalf of Respondent, revealed that the initial piping system was seriously defective as a result of poor quality workmanship in bending pipe; and that sketches of how the pipe should be bent were sent to a subcontractor in Yorkshire, England.

The Union thereupon requested to see a copy of the MIT study to evaluate whether it had reasons to process a potential grievance which was in fact filed a few weeks later, regarding loss of subcontracted piping work of its unit employees; and to enable the Union to determine whether the language in the current contract is sufficient to protect unit-employee work against subcontracting of such work. After denying the Union's request on several occasions, Respondent eventually advised that it was not going to make the study available to the Union. The work of replacing the initial piping system was in fact subcontracted to, and performed by, Yorkshire Imperial Metals, Yorkshire, England.

Since Respondent announced that the MIT study revealed serious defects in the piping system as a result of poor quality workmanship, and all work on prior piping systems had been performed by the unit employees of Respondent, I therefore conclude and find that the study was relevant and useful to the Union's representative function of the unit employees. *NLRB v. Acme Industrial Co.*, supra, and *Florida Steel Corp.*, 235 NLRB 941, 942 (1978), enfd. 101 LRRM 2671, 2674 (4th Cir. 1979), and *Anheuser-Busch, Inc.*, 237 NLRB 982, 984–985 (1978). Ordinarily, under such circumstances the employer is obligated to supply the Union with such relevant information as the study herein. Since the contents of the MIT study may very well determine whether or not the initial piping system was defective as a result of poor quality workmanship, as the Union was advised, and such work in replacing the system has in fact been subcontracted by Respondent, I find that the study was directly relevant to wages, hours, and working conditions of the unit employees. Under these circumstances the Union was entitled to the study pursuant to the above-cited authority.

However, Respondent argues that even if the MIT study is relevant and necessary to the representative function of the Union, the Union has nevertheless waived any right to the MIT study under the following language of step 2 of the grievance procedure:

> If there is disagreement as to the facts relating to the grievance, the Department Head and the Steward shall, at the request of either, jointly investigate the facts; *provided, however, that this shall not require the department head to make available to the Steward classified or confidential Employer records.* . . .

Respondent also argues that any right to the study was waived by a binding course of conduct of the Union during the administration of the collective-bargaining agreement; and that the Board should defer the Union's request for the study to arbitration, because the question requires a binding interpretation of the above-quoted step 2 language of the collective-bargaining agreement.

Did the Union Expressly Waive Its Right to the Information Requested?

A careful reading of the step 2 language of the above grievance procedure readily reveals that it is addressed to disagreements between employees and management about factors which are the subject of a grievance at the second step, and who shall investigate the grievance on a request by either party. As counsel for the General Counsel argues, here, the unit employees were deprived of work normally performed by them which was subcontracted by Respondent. The Union is requesting the study which may explain if, or how and in what way, the workmanship on the initial piping system was of poor quality; or whether the work subcontracted by Respondent was permissible under the current language of the contract. Hence, it is clear that there is no factual dispute between the parties about the subject of the grievance at this juncture. However, union access to the study, which is relevant, may establish grounds for disagreement, or agreement may be achieved disposing of any need to grieve the matter regarding the work subcontracted. Under the latter circumstances the Union may very well withdraw its grievance and spare itself the agony and expense of processing the grievance to arbitration. *Curtiss-Wright Corp.*, 347 F.2d 61 (3d Cir. 1965).

Waiver by Contract

Respondent further argues that, pursuant to the language of the step 2 grievance procedure, the Union waived its right to request and have access to "classified or confidential Employer records, such as its MIT study." However, it is readily noted that, while the language of step 2 does not define "classified or confidential Employer records," it is clear that such language is in reference to in-plant records relating to a disagreement on the facts involving a grievance at the step 2 level, and investigation of the grievance. There is no disagreement on the facts in the instant proceeding and the request was made before the potential grievance was filed. Rather, the grievances contend Respondent has violated the collective-bargaining agreement. Respondent does not categorically deny or admit such a violation, but simply refuses the Union's request for information (MIT study), contending Respondent had it prepared by an independent contractor in contemplation of a lawsuit against the Company, and the study is confidential. The credited evidence does not demonstrate that the Union was ever advised by Respondent, prior to this proceeding, that the study was a confidential employer record, or that it was confidential pursuant to step 2 of the grievance procedure.

Additionally, the record evidence does not show that, during negotiations for the current or any prior contract between the parties, the parties ever discussed "classified confidential Employer records."

Consequently, in the absence of such evidence, I conclude and find that the language of step 2 of the grievance procedure contains a waiver by the Union to access to in-plant Employer records classified "confidential," when such records relate to facts in dispute of a step 2 grievance. However, I further conclude and find that, although the MIT study is a document purchased by Respondent, it is not an Employer record, normally received, recorded, and maintained in the usual course of business, or affidavits or other personal and private records of employees. Instead it is a document prepared by an independent contractor, a copy of which was received by Respondent, and it is very much relevant to the work which was subcontracted by Respondent. The language of step 2 of the grievance procedure does not make reference to such nonemployer record documents as the MIT study and the parties have no bargaining history in respect thereto.

Since Respondent herein is under a statutory duty to furnish information requested by the Union, and the Union has a corresponding right to receive such relevant information, the Union's right to access to the MIT study herein is conferred by statute, and not obtained by contract. Under such circumstances, the court held in *C & P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), as follows:

> National labor policy disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed. Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.

The court continued:

> The language of a collective bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in waiving the statutory right. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 722 (2d Cir. 1966). . . . The same standard applies to conduct of the parties; whether alone or in combination with contractual language, conduct can effectuate a waiver only if the union's intent to waive is clear and unmistakable from the evidence presented. *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982) (*Road Sprinkler II*); *Communications Workers Local 1051 v. NLRB*, 644 F.2d 923, 927 (1st Cir. 1981).

Thus, a comprehensive reading of the step 2 waiver clause herein readily reveals on its face that the waiver of disclosure of confidential employer records does not apply to *all confidential information* in the possession of Respondent. If the waiver clause were intended to include all confidential information, employer records, and otherwise, the parties should have used explicit language to that effect. In the absence of such precise language, I find that the waiver language of step 2 does not clearly and unmistakably include a document such as the MIT study and, as such, a waiver of the right to the study has not been effectuated. *C & P Telephone Co. v. NLRB*, 687 F.2d 633 (2d Cir. 1982); *PPG Industries*, 255 NLRB 296 (1981).

Notwithstanding, and assuming arguendo, that the language of step 2 does constitute a waiver to all confidential information in Respondent's possession, Respondent has failed to establish, as hereinafter found, that the MIT study has a legitimate aura of confidentially because of its private and sensitive nature, or because Respondent will probably sustain economic or other injury in its business. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *New Jersey Bell Telephone Co.*, 265 NLRB 1382 (1982).

Respondent also argues that the Board should defer the question of the Union's request for the MIT study and Respondent's refusal to arbitration, because it raises an issue which requires a binding interpretation of the step 2 language of the collective-bargaining agreement. While this argument is recognized by me, it is also noted that Respondent first argued that the Union, under the contract and also by its conduct, waived its right to the MIT study as a confidential employer record. These two arguments raise the question of the old cliche: "which came first, the chicken or the egg." Obviously the first question here is the question of waiver, and a determination of that question requires a comprehensive reading of the language of step 2 of the grievance procedure, an examination of the record for evidence of bargaining history of the parties, and conduct of the Union, which manifested a clear and unmistakable intent by the Union to waive its right to information such as the MIT study.

Such an examination of the evidence is necessary to ascertain whether Respondent's refusal is in violation of the Act, as well as possibly sparing the Union from unnecessarily undertaking the time and expense of processing grievances to arbitration, which may be resolved simply by reading the clear language of the contract. This practice has been followed by the courts and the Board in several cases. *C & P Telephone Co. v. NLRB*, 687 F.2d 633 (2d Cir. 1982); *PPG Industries*, 255 NLRB 296 (1981); and *Pacemacher Yacht Co.*, 253 NLRB 828, 830 (1980).

Having examined the language of step 2 and the record evidence of the bargaining history of the parties, I do not find a clear and unmistakable intent by the Union to waive its right to all information (including the MIT study) claimed "confidential" by Respondent. I therefore conclude and find that the Union did not waive its right to such information as the MIT study. Consequently, there is no legitimate or meritorious dispute on the meaning of the language of step 2, which on its face is clear. This being so, there is no question necessitating deferral to arbitration for interpretation of the contract. Instead, the question remaining for determination is whether Respondent's refusal violated Section 8(a)(5) of the Act. *C & P Telephone Co.*, above; *Pacemaker Yacht Co.*, above.

Waiver by Conduct

In support of its contention that the Union, by a course of conduct, has waived any right it had to confidential Employer records, Respondent cites testimony of Union President Brandow, wherein he acknowledged that on one occasion in the past he requested records which the Company advised were confidential. Brandow thereupon wrote a grievance demanding the Company's affirmative action plan. The Company's written reply advised him that the plan was confidential. Brandow did not testify that the Union further grieved the Company's refusal. However, the fact that the Union did not renew its request or grieve Respondent's refusal does not, on this one occasion, necessarily mean that it waived its right to request and receive such information. The absence of further action by the Union in this regard could very well have meant that it no longer deemed the plan necessary for the purpose for which it was first requested.

Other union conduct which Respondent contends constituted evidence of waiver by the Union is testimony by grievance chairman St. Clair, who acknowledged that the Company has denied the Union's request for health and safety information on several occasions. However, St. Clair further testified that although the Company said the information was confidential, it also told the Union to request the information through its safety committee. Since the information requested on each such occasion was for blood-test-for-lead results of individual employees, the Union said it did not need the identity of the individual employees and the Company supplied the safety committee with the test results without identification of employees.

It is further noted by me that Respondent did not advise the Union that its initial refusal to furnish the results of the blood-lead tests was based on confidentiality pursuant to step 2 of the grievance procedure. The Union might have later recognized that it did not need the identity of the employees for the purpose for which the request was initially made, and therefore advised Respondent accordingly. Evidently, it was not necessary for the Union to grieve Respondent's initial refusal to supply the test results because the Union was not precluded from effectively performing its representative function by the refusal. The information it needed was supplied by the Company upon a condition (without identification of employees) acceptable to the Union.

While the above facts are well stated in the record, the MIT study, as previously found herein, is not a document by which the waiver clause language of step 2 of the contract is governed. Nonetheless, further assuming, arguendo, that the MIT study is deemed governed by the step 2 language, one might speculate on the above limited evidence whether the Union, by not grieving the Company's past refusal on confidentiality, waived its statutory right to receive the MIT study. In this regard, it is clear from the evidence that the above-discussed union conduct did not constitute a consistent pattern of conduct, which was clear and unmistakable that the Union intended to waive its right to all information labeled "confidential" by Respondent. In the absence of such clear and unmistakable evidence, an employer's duty to furnish the Union relevant information requested by it, and the Union's corresponding entitlement to such information, cannot be found waived. *Road Sprinkler Fitters Local 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982), and *PPG Industries*, 255 NLRB 296, 297 (1981).

Respondent Argues Confidentiality

Respondent argues that the MIT study is privileged and confidential, and therefore outweighs any right the Union has to receive it; that the MIT study was prepared in contemplation of litigation against the Company and therefore is not obtainable unless, pursuant to New York law, it cannot be duplicated because of changed conditions, and withholding it will result in injustice or undue hardship. *Johnson, Drake & Piper, Inc. v. State*, 62 Misc. 2d. 725, 309 NYS 2d 645, 649 (1970). This privilege, Respondent argues, is incorporated in Section 3101 of the New York Civil Practice Law, and also in Section 26(b)(4)(B) of the Federal Rules of Civil Procedure. However, a reading of these sections as well as *Johnson, Drake & Piper, Inc.*, above, all clearly disclose that such material prepared for litigation by one party may not be obtained by the other *party* to the litigation. Since the Union in the instant case is not a party to the litigation in which Respondent is involved, it appears that the legal authorities cited by Respondent are inapplicable to the Union and to the facts in this proceeding.

While Respondent concedes that the employer's obligation "includes a duty to provide relevant information necessary for the Union to effectively perform its duties to employees in processing their grievances," *NLRB v. Acme Industrial Co.*, above, it nevertheless argues that the Union's right to such information has never been *unlimited*, and the employer's refusal to furnish such information must be considered in view of a determination as to whether the employer has satisfied the obligation to bargain in good faith. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153–154 (1956). In this regard, Respondent cites *Western Massachusetts Electric Co. v. NLRB*, 589 F.2d 42, 47 (1st Cir. 1978), where the court said:

> [L]egitimate management reasons for objecting to disclosure—such as a demonstrated probability of economic injury to the company's business from the disclosure—furnish some basis for protecting an employer by limiting if not denying disclosure. [Citations omitted.] *A shotgun approach to enforced discovery may be inappropriate*, at least when dealing with management information of this type as contrasted with wage data, *where the union's demonstrated need is relatively slight and management's legitimate reasons for nondisclosure are compelling*. . . . There is no statutory rule of disclosure—only the requirement that the employer bargain in good faith. . . . *An employer is entitled to show that special circumstances justify some protection, just as parties to litigation may be entitled to protective orders in the course of discovery*. [Emphasis added.]

Consequently, Respondent contends that, since the MIT study was undertaken by it in contemplation of a lawsuit, which has in fact been filed and may subject Re-

spondent to liability for as much as $18 million, the MIT study is a confidential employer record. Respondent seems to imply from such contention that its disclosure of the MIT study to the Union may cause it economic injury. However, a review of the facts in this case in conjunction with the pleadings (R. Exh. 1) in the suit in the New York Supreme Court against Respondent by Coastwise Trading Company, Inc., it is particularly observed that the relief or damages sought therein are in large part stipulated and dependent on a resolution of diverse interpretations of the construction contract (including a "Delivery Certificate") between the parties.

The suit against Respondent does not allege negligence or intentional delay for which unspecified damages are sought, or might be sought. It merely alleges damages actually sustained, and asserts a right under the contract to cancel the contract for delay in delivery occasioned by a defective piping system which had to be replaced. The record is barren of any evidence by Respondent as to how Respondent would sustain any economic injury in excess of that allegedly already occasioned by the delay, as a result of allowing the Union to examine the MIT study. In other words, if Respondent is liable at all in the New York suit, it appears that the damages are already determinative by the contract and the delay in delivery. The evidence fails to show how Respondent would sustain other economic injury by allowing the Union access to the MIT study. Nor does the evidence demonstrate how or in what manner Respondent may otherwise suffer probable injury, such as that which could result from a disclosure of trade secrets, disclosure of identifying medical, or other professional and privileged information on individual employees, or by other special circumstances justifying protection of legitimate business interests. *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982).

The only basis advanced by Respondent for refusing the Union access to the study is its contention that the study was undertaken by Respondent in contemplation of a lawsuit against it, which suit has in fact been instituted as heretofore mentioned. Respondent's refusal to allow the Union access to the study is, at most, a bare claim of confidentiality which is unsupported by evidence of confidentiality or probable injury as a result of disclosure. In the absence of such evidence, I am not persuaded that Respondent has established that the MIT study is within the protective exceptions to its statutory duty to supply requested information, as enunciated by the courts and the Board in *Detroit Edison Co. v. NLRB*, above; *Western Massachusetts Electric Co.*, above, and *Minnesota Mining & Mfg. Co.*, above.

Although Respondent characterizes the Union's request for the study as an unspecified need for the study, the evidence does not support this characterization. On the contrary, both the Union's oral as well as its written request for the study made reference to a potential grievance, and thereafter to actual grievances about the piping work previously performed by unit employees but subcontracted by Respondent to Yorkshire Imperial Metals in violation of their agreement.

Article XX of the current collective-bargaining agreement between the parties provides as follows:

Subcontracting

> The Employer agrees not to subcontract work normally performed by the employees under this Agreement, when proper equipment and employees are available, in order to deprive employees of work.

Since the work subcontracted herein was work which had been performed by the unit employees in the past, and Respondent had advised the Union the study indicated that the work replacing the piping system had to be subcontracted as a result of poor quality workmanship on the initial piping system, and because Respondent did not have some of the employees, equipment, and procedures necessary to prepare the piping work, disclosure of the MIT study is certainly relevant and necessary for the Union to determine whether the unit employees were deprived of work which was subcontracted, either in compliance with, or in violation of, the above subcontracting provision of the agreement; and to determine whether the current language of the agreement is sufficient to assure protection of employees' work from being subcontracted in the future. Both reasons for the Union's need for the study clearly show that access to the study would, or probably would better, enable the Union to intelligently evaluate whether to process grievances to arbitration.

Respondent also advocates balancing the Union's need for the information (study) against any "legitimate and substantial" confidentiality interest of Respondent, as the Board expressed in *Minnesota Mining & Mfg. Co.*, above. However, even in applying this balancing evaluative test to the facts herein, I find that Respondent has not presented any evidence of an aura of confidentiality of a legitimate and substantial business interest. Certainly it has not presented such a business interest which outweighs the Union's relevant and well-established need for the study, so as to compel the conclusion that Respondent need not allow the Union access to the study.

Although Respondent (Raffeld) gave the Union an oral report of what the MIT study is purported to contain, the Union was not satisfied with such oral report and insisted on its request for the study. Since the Union did not accept Respondent's oral account of the study as satisfactory, Respondent cannot maintain that it has satisfied its statutory duty to furnish requested information when it had every opportunity to select what information it desired to disclose, and withhold that which it desired not to disclose. Under these circumstances the Union would have to rely exclusively on the accuracy and integrity of Respondent. There would be no need for the duty of an employer to furnish information upon request of a union if that were the intent of Congress. The evidence does not show that Respondent ever offered to show the Union any part of the study. If it had, the Union might have found that it had sufficient information to carry out its representative function. In the absence of such evidence, Respondent's oral explanation of the report does not discharge Respondent's statutory duty to furnish the information (study) requested.

Finally, in determining whether Respondent is bargaining in good faith, the evidence shows that the Union has not waived its right to receive all information claimed confidential by Respondent; that the evidence has not established that Respondent had classified the MIT study as confidential information prior to this proceeding, or that the study actually has an aura of confidentiality which should be protected. Consequently, the evidence supports a conclusion that Respondent's refusal to furnish the Union with the information (MIT study) requested is a refusal to bargain collectively in good faith with the Union. Under such circumstances, Respondent's refusal is in violation of Section 8(a)(1) and (5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in close connection with its operations as described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, by refusing to furnish the Union relevant information requested by the Union for its evaluation in processing grievances under the collective-bargaining agreement, and that by so refusing Respondent has failed and refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such conduct.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

On the basis of the above findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. General Dynamics Corporation, Quincy Shipbuilding Division, Respondent herein, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called the Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union with access to the MIT study for its evaluation in effectively performing its representative function in processing employee grievances, Respondent has violated Section 8(a)(1) of the Act.

4. By failing and refusing to furnish the Union with access to the MIT study for its evaluation in effectively performing its representative function in processing employee grievances, Respondent has violated Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[6]

The Respondent, General Dynamics Corporation, Quincy Shipbuilding Division, Quincy, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Union access to the MIT study for its evaluation in performing its representative function of processing employee grievances.

(b) Refusing to bargain collectively with the Union as the exclusive representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Furnish, on request, to Local 5, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, access to the MIT study (report) which was prepared by Professor Edgar upon contract and on behalf of Respondent herein.

(b) On request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(c) Post at Respondent's Quincy, Massachusetts facility copies of the attached notice marked "Appendix."[7] Copies of said notice on forms provided by the Regional Director for Region 1, after being signed by Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."